

87-6796

ORIGINAL

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,  
Petitioner,  
vs.  
STATE OF GEORGIA,  
Respondent,

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF GEORGIA

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Petitioner James Arthur Ford prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

OPINION BELOW

Final rehearing denial on the judgment of the Georgia Supreme Court was rendered on February 15, 1987, and is attached as Appendix A hereto. Rehearing was initially denied on December 16, 1987 but was vacated because no notice was given to Petitioner's counsel about rehearing denial. The opinion of the Georgia Supreme Court following remand from this Court was rendered November 30, 1987, reported at 257 Ga. 661, 362 S.E.2d 764 (Ga. 1987), and is attached as Appendix B hereto. This Court's grant of certiorari and remand back to the Georgia Supreme Court was announced on February 23, 1987, reported at 479 U.S. \_\_\_, 94 L.Ed.2d 129 (1987), and is attached as Appendix C. The Georgia Supreme Court opinion which formed the basis of Petitioner's first petition for certiorari is reported at 335 S.E.2d 567 (1985), and is attached as Appendix E.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The Fourteenth Amendment provides:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner is a black man confronting death by electrocution following his conviction for murder of a white storeowner and the imposition of a death sentence by an all-white jury. Prior to Petitioner's trial, a motion was filed requesting that the Prosecutor be prohibited from using peremptory challenges in a racially biased manner. (C.R. 49-50). At the pre-trial hearing on Petitioner's motion, defense counsel "stated in his place" that there is a history and pattern of prosecutors using peremptories to strike blacks in cases involving black defendants. (R. 160-

"(C.R. \_\_\_)" refers to the Court Clerk's record.  
"(PT.R. \_\_\_)" refers to the pre-trial record transcripts.  
"(R. \_\_\_)" refers to the trial record transcripts.

161). Defense counsel requested that the trial court "require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for excusing them." (R. 160-161). The trial court, relying on the evidentiary standards set out in Swain v. Alabama, 380 U.S. 202, (1965), denied this request. (R. 162).

The prosecutor subsequently used peremptory challenges to strike nine out of ten black jurors resulting in an all-white jury to determine Petitioner's guilt or innocence and whether he lives or dies. At trial, the trial judge again relying on Swain noted that not all blacks had been struck in Mr. Ford's case and therefore refused to require the prosecutor to give explanation for his exercise of peremptory strikes. (R. 267-268). At a motion for new trial and on direct appeal to the Georgia Supreme Court, Petitioner maintained that his Sixth and Fourteenth Amendment rights had been violated by the prosecutor's racially discriminatory exercise of peremptories and the trial court's refusal to require the prosecutor to give reasons for his racially biased use of peremptories. (See Petitioner's Brief on Direct Appeal to the Georgia Supreme Court attached as Appendix F). The Georgia Supreme Court ruling on the merits of Petitioner's claim, rejected his arguments stating that Petitioner had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572.

After filing a petition for writ of certiorari to the Georgia Supreme Court on this issue, this Court last term granted Mr. Ford's petition and remanded his case to the Georgia Supreme Court with instructions to reconsider Petitioner's constitutional challenge to the prosecutor's racially discriminatory use of peremptories in light of Griffith v. Kentucky, 479 U.S. \_\_\_, 93 L.Ed.2d 649 (1987), which made Batson v. Kentucky, 476 U.S. 76, 90 L.Ed.2d 69 (1986) retroactive to all cases pending on direct

review. Ford v. State, 479 U.S. \_\_\_, 94 L.Ed.2d 129 (1987).

On remand the Georgia Supreme Court concluded that Petitioner's trial and direct appeal challenge to the prosecutor's racially discriminatory exercise of peremptory strikes as violative of the Sixth and Fourteenth Amendments was a substantively distinct claim under "Swain" and thus not reviewable as ordered by this Court under "Batson". Ford, 362 S.E.2d at 766. The Georgia Supreme Court additionally defined new state procedural requirements on preserving a "Batson" claim for review, unannounced and unknown at the time of Petitioner's trial, which bars retroactive application of the Batson rule. Justice Gregory and Justice Hunt in dissent. (See Appendix B).

#### HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner, upon review of the Georgia Supreme Court's opinion following remand from this Court, timely filed a motion for rehearing on December 10, 1987, in the Georgia Supreme Court. (See Appendix D). Petitioner argued that the Georgia Supreme Court's decision is not in compliance with this Court's remand order; that Batson and Swain are not different constitutional claims; that an adequate objection was made at trial to the prosecutor's racially biased use of peremptories, and that the application of a previously unannounced state objection procedure is illegitimate and violates Petitioner's right to due process. (See Petitioner's Motion for Rehearing, Appendix D).



#### REASONS FOR GRANTING THE WRIT

The Georgia Supreme Court's refusal to reconsider Petitioner's case in light of Griffith v. Kentucky, fails to comply with this Court's mandate and instructions issued in Ford v. Georgia, 479 U.S. \_\_\_, 94 L.Ed.2d 129 (1987). This Court's earlier grant of certiorari in Petitioner's case and remand for further consideration in light of Griffith v. Kentucky, was predicated on the fact that Petitioner's challenge to the prosecutor's use of peremptory challenges against black jurors asserted a substantial federal question under the Equal Protection Clause of the Fourteenth Amendment. This Court's mandate contemplated that Georgia would consider whether, as a matter of federal law, petitioner's case could stand in light of the retroactive application of Batson v. Kentucky, 476 U.S. 79 (1986). Since the state court failed to follow this Court's order and did not decide that question this Court should now do so. See e.g., Yates v. Aiken, 484 U.S. \_\_\_, 98 L.Ed.2d 546 (1988) (Court grants certiorari following the South Carolina Supreme Court's failure to comply with Court's mandate to reconsider Yate's case in light of Francis v. Franklin, 471 U.S. 307 (1985)).<sup>1</sup>

The Georgia Supreme Court's refusal to follow the mandate of this Court is based on at least two egregious misreadings of the law. The first of these is the state court's erroneous belief that Swain v. Alabama, 380 U.S. 202 (1965) and Batson define different substantive claims under the Equal Protection Clause of the Fourteenth Amendment, thus making Petitioner's challenges at

1. Petitioner would respectfully note that this Court has made summary decisions in cases granted certiorari with increasing frequency. The Georgia Supreme Court's failure to follow this Court's remand Order unquestionably undermines this Court's policy to expeditiously resolve some cases through summary practice and should not be tolerated. The Georgia Supreme Court issued its opinion following this Court's remand without briefing or argument from the parties on the application of Batson to Petitioner's case.

trial to the prosecutor's use of peremptory strikes inadequate to preserve a Batson claim. The second is the state court's view that a previously unannounced objection procedure can be invoked to procedurally bar retroactive application of this Court's decision in Batson as prescribed in Griffith.

1. Batson and Swain Do Not Define Different Constitutional Claims Under the Equal Protection Clause of the Fourteenth Amendment.

By concluding that "Ford's motion under Swain, having been decided against him on appeal, cannot be reviewed in this proceeding", the Georgia Supreme Court has effectively held that Swain and Batson define different constitutional claims under the Equal Protection Clause of the Fourteenth Amendment. The state court's conclusion is in direct conflict with this Court's decision in Batson and Swain and fails to follow this Court's mandate and remand order.<sup>2</sup>

Claims under Batson and Swain are identical in that they challenge racially discriminatory use of peremptories as being violative of the Equal Protection Clause. Batson simply changes the evidentiary standard by which the merits of the same claim are to be determined. In Batson this Court was required to reexamine the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Batson, 90 L.Ed.2d at 77. After undertaking this examination, the Court held that with regard to use of peremptory challenges in a criminal trial, "a consistent pattern of racial discrimination is not a necessary predicate to

2. Petitioner would also note that the Georgia Supreme Court wrote in its November 30, 1987 opinion, the "Supreme court of the United States vacated its grant of Ford's petition for certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded to the Supreme Court of Georgia for further consideration in light of Griffith v. Kentucky, supra." Ford, 362 S.E.2d at 764. The state court however misconstrues the action of this Court. On February 23, 1987, this Court granted certiorari and vacated the judgment of the Georgia Supreme Court. Ford, 94 L.Ed.2d at 129.

a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, at 87, citing, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

As stated by Justice White in his concurrence, Batson overturned the principal holding in Swain [citations omitted], that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons." Batson, at 90.

It is precisely this now overturned Swain holding that the trial court relied on in rejecting Petitioner's challenge at trial. In rejecting Petitioner's claim at trial, the trial court determined that not all blacks had been struck at Petitioner's trial and that not all black jurors had been peremptorily struck by the prosecutor in other cases involving black defendants. (PT.R. 162). Similarly, the Georgia Supreme Court on appeal, relying on Swain, concluded that Petitioner had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572.

Because of the incorrect analysis applied by the Georgia courts, this Court remanded with instruction to apply the new Batson standard made retroactive in Griffith. The state court's refusal to do so upon specific instruction from this Court makes necessary the grant of certiorari in Petitioner's case.

2. Petitioner's Fourteenth Amendment Challenge to the Prosecutor's Racially Discriminatory Use of Peremptories is Not Procedurally Barred.

Petitioner clearly presented his claim that his Fourteenth Amendment rights were being violated by the prosecutor's racially

discriminatory use of peremptories. He first filed a pre-trial "Motion to Restrict Racial Use of Peremptory Challenges". Before jury selection began, trial counsel specifically requested that the prosecutor be required to give reasons if peremptories were exercised against black jurors. (PT.R. 160-61). The trial court refused to require the prosecutor to give any reasons for peremptories employed against blacks. (PT.R. 162).

At the trial defense counsel made clear that during jury selection which is untranscribed, the prosecution used nine out of ten peremptories to strike nine out of the ten black jurors in the venire. Again, the trial court made clear its position that no violation of the Sixth or Fourteenth Amendment could be made out on these facts. (R. 267-68). At motion for new trial and on appeal to the Georgia Supreme Court the claim was presented as a violation of Petitioner's Sixth and Fourteenth Amendment rights.

At several occasions pre-trial, during the trial, after the trial and on appeal, Petitioner tried to get the Georgia state courts to do what this Court now requires it to do: not presume that the prosecutor's racially disparate exercise of peremptories against blacks is legitimate and make the prosecutor give reasons for his seemingly racially discriminatory acts.

Petitioner gave the state courts every opportunity to remedy the error alleged in this case and on each occasion the state courts declined to do so. Prior to this Court's remand the state courts did not act unreasonably under existing law, but the law has changed and a showing must now be made on the prosecutor's use of peremptories.

3. The State of Georgia Can Not Invoke an Expressly Prospective State Objection Procedure Unannounced and Unknown at the Time of Petitioner's Trial to Bar Retroactive Application of Batson.

Despite the fact that at every instance that the state courts reviewed Petitioner's claim prior to this Court's remand the claim was addressed on the merits, the Georgia Supreme Court has now held that Petitioner's claim is procedurally defaulted.



The state court relies on a procedural rule articulated for the first time in State v. Sparks, 355 S.E.2d 658 (Ga. 1987). However, the rule announced in Sparks was an expressly prospective one: "[H]ereafter, any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Sparks, 355 S.E.2d at 659, (emphasis added).

Notwithstanding the fact that defense counsel in this case had objected to the prosecutor's racially discriminatory use of peremptories and requested that the prosecutor give reasons for his strikes before the jury was sworn, the application of this rule to Petitioner's case is in direct conflict with the constitutional requirement that a state procedural rule must be "clearly announced to defendant and counsel" to be legitimate and binding. Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965). This Court has made it clear that there can be no procedural bar to implementation of federal constitutional rights unless the procedural rule is a "firmly established and regularly followed state practice". James v. Kentucky, 466 U.S. 341 (1984); Hathorn v. Lovorn, 457 U.S. 255, 262-263 (1982).

The state rule in Sparks concerning the timing of a Batson challenge was not announced until May 19, 1987, and is on its face an expressly prospective one. The state court's application of the rule to Petitioner's capital case which took place some two years earlier is merely a refusal on the part of the state court to meet the clear mandate of this Court. This Court should therefore grant certiorari and address this manifestly unjust result.

4. Petitioner's Case Presents An Important Question Concerning the Application of the Sixth Amendment's Fair Cross-Section Requirement to the Discriminatory Use of Peremptories Against Trial Jurors.

On March 7, 1988, this Court granted certiorari in Teague v. Lane, No. 87-5259, 42 Cr.L. 4197 (1988), which presents the question of whether the Sixth Amendment fair cross-section re-

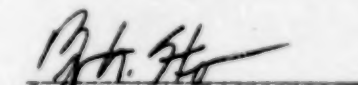
quirement prohibits the prosecution's racially discriminatory use of the peremptory challenge. In addition to the violation of Petitioner's Fourteenth Amendment rights, Petitioner contends that the prosecutor's use of nine out of ten peremptory strikes against blacks resulting in an all-white jury violated his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community. This issue, rejected by the state courts in Petitioner's case, was expressly left undecided by this Court in Batson v. Kentucky, 106 S.Ct. 1712, 1716 n. 4 (1986), and is presently before the Court in Teague v. Lane.

Because Petitioner's case presents the identical issue, this Court should grant certiorari and review Petitioner's case under this Court's holdings in Batson and under a Sixth Amendment fair cross-section analysis.

#### CONCLUSION

This Court should grant this petition for writ of certiorari to the Supreme Court of Georgia.

Respectfully submitted,

  
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